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No. 80-1429

In The Supreme Court of the United States

October Term, 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

REPLY BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Supplemental Statement of the Case	1
Argument:	
I. This case is presently in the proper posture to be considered by this Court	2
II. The issue of good faith immunity has been preserved for appeal and provides the basis for affirming the jury's determination	4
Conclusion	5

TABLE OF CITATIONS

CASES:

In Re Schmidt, —— Pa. ——, 425 A.2d 393 (1981)	4
O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980)	2
O'Connor v. Donaldson, 422 U.S. 563 (1975)	3
Okin v. Rogers, No. 80-1417, cert. granted, April 20, 1981	2
Pennhurst State School and Hospital v. Halderman, 49 U.S.L.W. 4363 (April 20, 1981)	2, 3, 4
Procunier v. Navarette, 434 U.S. 555 (1978)	5
Sanchez v. New Mexico, 306 U.S. 276 (1970)	3

STATUTE:

Developmentally Disabled Assistance and Bill of Rights Act (DD Act), 42 U.S.C. Sec-6001 et seq. 2, 3

SUPPLEMENTAL STATEMENT OF THE CASE

At several places in the brief in opposition to the grant of certiorari,[1] respondent Romeo refers to the "unanimous, *en banc* decision of the Third Circuit." *See, e.g.*, Romeo Bf. at 5. While all of the circuit judges agreed that a new trial was necessary, four of the nine judges drastically disagreed with the nature and scope of the rights created by the other five judges. App. 48a-78a.[2]

Throughout his brief, respondent Romeo asserts as facts matters which were in many cases the subject of conflicting testimony presented to the jury. Because the jury did not answer any interrogatories in finding for the defendants here, these statements simply represent matters on which plaintiff presented testimony, and not necessarily the facts of the case.

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[1] Citations to this brief will be in the following form: "Romeo Bf. at 1, 2, etc."

[2] "App." references are to petitioners' appendix to the petition for writ of certiorari.

ARGUMENT

I. This Case Is Presently in the Proper Posture To Be Considered by This Court

Respondent's principal argument appears to be that review of this case should await the remand to the district court. This Court has not hesitated in the past to review a circuit court order involving a remand which involves a clearly-articulated legal issue. *See, e.g., Okin v. Rogers,* No. 80-1417, *cert. granted,* April 20, 1981; *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773 (1980). In light of the confusion and uncertainty created by the Third Circuit's opinion, a remand here would serve no useful purpose.

The importance of a decision in this case has been highlighted by the decision of this Court in *Pennhurst State School and Hospital v. Halderman,* 49 U.S.L.W. 4363 (April 20, 1981). In *Pennhurst,* a majority of this Court declined to find a right to treatment under the Developmentally Disabled Assistance and Bill of Rights Act (DD Act), 42 U.S.C. §6001 *et seq.*[3] So long as the constitutional rights of the institutionalized mentally retarded are not addressed by this Court, uncertainty and confusion will continue.

[3] Respondent has argued that this case does not merit review because the same rights exist under the DD Act. Romeo Bf. at 13, n. 14, 18, n. 20, 24, n. 29. This Court's rejection of such an argument in *Pennhurst* substantially undermines respondent's argument here.

Moreover, this Court's discussion in *Pennhurst* has cast doubt on both the holding and the reasoning of the Third Circuit opinion in *Romeo*. In *Pennhurst*, this Court stated that it had "never found the involuntarily committed have a constitutional 'right to treatment,' much less the voluntarily committed," 49 U.S.L.W. at 4367, n. 12, citing both *Sanchez v. New Mexico*, 306 U.S. 276 (1970) (dismissing for want of a substantial federal question a lower court decision holding that the involuntarily committed have no right to treatment), and *O'Connor v. Donaldson*, 422 U.S. 563, 587-89 (1975) (Burger, C.J., concurring) ("right to treatment" criticized). The Third Circuit majority, however, stated that *Sanchez* was no longer binding due to "subsequent doctrinal developments" (App. 37a, n. 56). The developments cited were *O'Connor* and the DD Act (App. 38a, n. 56). In addition, while the Third Circuit analyzed the "right to treatment" in terms of "least restrictive," "least intrusive," "adequate" and "acceptable", this Court commented on similar standards under the DD Act in *Pennhurst:* "It is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting. . . ." 49 U.S.L.W. at 4368. It would be anomalous to find that such uncertain terms nonetheless are constitutionally based.

Finally, respondent's suggestion that the admission of expert testimony on remand will narrow the issues here is chimerical. At a re-trial, the district court judge would have to decide what testimony is relevant under the Third Circuit's opinion. If the Third Circuit decision is incorrect in any way, there is a great likelihood of reversible evidentiary rulings on re-trial.[4] Thus, judicial economy

[4] Because *Romeo* is binding in the Third Circuit at present, other cases will be affected so long as the decision stands.

would best be served by this Court's considering *Romeo* now.[5]

II. The Issue of Good Faith Immunity Has Been Preserved for Appeal and Provides the Basis for Affirming the Jury's Determination

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Respondent's suggestion that the issue of good faith immunity as a matter of law was not raised below is simply untrue. Judge McGlynn specifically instructed the jury on good faith immunity (App. 113a-114a) and defendants argued the issue in their brief in the Third Circuit (Brief of Appellees at 33-40). In any event, appellees do not have the burden of raising by a cross-appeal the issue of good faith immunity where a jury has found in their favor. Any grounds which provide a basis for affirming the jury's verdict were properly before the Third Circuit.

Alternatively, respondents seem to suggest that, due to the mere filing of the *Pennhurst* litigation in 1974, no one can claim good faith immunity for actions after that date. *Romeo* Bf. at 26, n. 34. Even if the Third Circuit decision were to stand, no one can seriously argue that the *Romeo* "rights" were "clearly established" prior to

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[5] Respondent's citation to *In Re Schmidt*, Pa. , 425 A.2d 393 (1981), for the proposition that he has a state law right to treatment is mystifying. While *Schmidt* contains language concerning such a right, it is plainly dicta and comes at least three years after the events in question here. More importantly, Romeo has never pled a state law claim. *See* Second Amended Complaint (App. 86a-92a).

the date of that decision, let alone by the mere filing of a lawsuit in 1974. *See Procunier v. Navarette*, 434 U.S. 555 (1978). Thus, because the record would not support a finding of intent to injure plaintiff and the alleged rights were not clearly established at the time in question, the Third Circuit should have dismissed the claim for damages.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

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